BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANE COOPER	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,061
U.S.D. 475	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF SCHOOL BOARDS	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the July 12, 1999, Award of Administrative Law Judge Bryce D. Benedict. The Administrative Law Judge awarded claimant a 99 percent permanent partial general disability, finding claimant had proven that she suffered accidental injury arising out of and in the course of her employment. The Administrative Law Judge also found that claimant was a full-time employee of the school district at the time of the accident. Oral argument to the Board was held on November 24, 1999.

APPEARANCES

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge were considered by the Appeals Board for the purposes of this award. The parties have also stipulated claimant has suffered a 5 percent permanent partial functional disability as a result of this accident.

ISSUES

(1) Did claimant's accidental injury arise out of and in the course of her employment on the date alleged?

(2) What was claimant's average weekly wage on the date of accident?

(3) What, if any, is the nature and extent of claimant's disability?

(4) Who should be responsible for the payment of the costs and fees associated with the second Monty Longacre deposition taken May 5, 1999?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent as a custodian on January 20, 1998. She was first instructed to appear at the U.S.D. 475 maintenance center to undergo training. On that date, claimant watched videos and was given handouts explaining her job tasks. After watching approximately half the videos, claimant excused herself and went into the maintenance center parking lot to obtain her coffee from her car. While in the parking lot, claimant slipped and fell, suffering injury. There were no witnesses to the fall. She returned to the maintenance center and reported the fall to Efrem Winder, Sr., the custodial manager for the school district. Mr. Winder is actually an employee of Service Master, which is under contract with the school district to provide custodial services. But he oversees all the custodians in the school district. He interviewed claimant on several occasions on behalf of the school district and hired her.

Mr. Winder testified that claimant initially advised him that her injury was to her ankle. Claimant, however, testified that the injury was both to the ankle and the back.

Later that day, claimant went to Sheridan Elementary School to perform janitorial work, completing the first day. On the morning of the second day, claimant was unable to attend work. Mr. Winder contacted her at approximately 7:30 in the morning, and claimant advised him she was hurting and could not get out of bed. Mr. Winder called claimant every day that week, and on Thursday claimant advised him that she could not work and was injured too badly, and, by Friday, if she was no better, she would have to go to the doctor. On Friday, claimant went to the Irwin Army Hospital. Claimant was ultimately

referred to several doctors, including Dr. Ronald Mace, Dr. K. N. Arjunan, Dr. Zhengyu Hu, Dr. Donald Morgan and Dr. Sergio Delgado.

Claimant began treating with Dr. Zhengyu Hu, a board certified physiatrist, on May 18, 1998. She was referred to Dr. Hu by Dr. Morgan. Claimant's initial complaint was to the low back with pain limitations since January 1998. On neurological examination, he found claimant to have grossly decreased sensation to touch and pinprick in the right lower extremity. He also found give-away weakness and other findings that could not be explained physiologically.

On June 18, 1998, Dr. Hu released claimant back to work with some limitations. Claimant contacted the school district in September and was returned to work by the school district within her restrictions. Claimant, however, could only work for one hour due to the pain and left. Mr. Winder testified that, when claimant showed up for work that day, she injured herself walking up the steps to the custodial office. As of Mr. Winder's deposition on May 27, 1999, he testified that claimant was still on the payroll as an on call custodian, but he had not heard from her since September 1998.

Dr. Hu found no legitimate neurological compromise in claimant from an objective standpoint. He diagnosed lumbosacral supraspinous and interspinous ligament injury, and recommended steroid injections and therapy. In his May 22, 1998, examination, he found claimant's complaints to be unchanged, with continued tenderness to palpation in her lumbar spine.

Claimant was first provided steroid injections on May 22, 1998. She reported approximately two hours of pain relief after the first injection. A second injection was administered on May 27, 1998, with claimant reporting only a couple of minutes of relief. Dr. Hu felt that this result was inconsistent. He felt claimant's pain complaints had no neurological component because the results from the second injection should have been similar to the first. Claimant underwent EMGs and MRIs which indicated bulging discs at L3-4, L4-5 and L5-S1, but there was no disc herniation.

Dr. Hu felt claimant's responses were untruthful based upon the give-away weakness and initial decreased sensation, coupled with normal and symmetrical deep tendon reflexes. He also found claimant's different responses to medications and her different responses to the injections to be inconsistent. He released claimant as of June 3, 1998, recommending no additional medical treatment and opining that she was at maximum medical improvement. The only restriction placed upon claimant was that she be allowed to stretch for five minutes of every hour at work. He did not provide claimant with an impairment rating as he was not requested to perform an impairment rating evaluation.

Claimant first began treatment with Dr. Sergio Delgado, a board certified orthopedic surgeon, on September 9, 1998. At that time, she was given another epidural cortisone injection and placed on anti-inflammatories. By October 20, 1998, claimant's complaints related mostly to the back, with only occasional complaints into the legs. Dr. Delgado's neurological examination of claimant's legs was normal. He recommended ongoing conservative treatment and possibly the use of a back support. He felt that, as of October 20, 1998, claimant had reached maximum medical improvement. On November 16, 1998, he provided a 5 percent whole person rating regarding claimant's injury based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He restricted claimant from lifting from the floor to a maximum of 10 to 15 pounds, from waist to above head level of 20 pounds, and recommended she alternate sitting and standing. Ideally, claimant should alternate her sitting and standing every hour, but she could tolerate up to two hours at a time without change.

Claimant contends that, when she was hired, she requested full-time employment. Respondent, on the other hand, contends claimant was hired as a part-time employee. The dispute centers around claimant's conversations with Mr. Winder and a school district representative, whom claimant identified as Dr. Brooks. Claimant testified she was hired as a full-time employee at $6.95 per hour. This testimony was accepted by the Administrative Law Judge for purposes of computing claimant's average weekly wage in the Award.

Respondent contends claimant was hired as a part-time on call custodian at $5.95 per hour with a possible raise to $6.15 per hour after 90 days. Mr. Winder testified that the school district did not hire full-time custodial employees but, instead, hired them on a part-time basis in order to ascertain their ability to perform the job. Claimant testified she also talked about her pay with a Dr. Brooks, who is not further identified in the record. Mr. Winder testified that claimant would have talked to Dr. Kimball, the personnel director of the school district. However, claimant did not identify any conversations with Dr. Kimball.

A "Notification of Wage" form, which was not completed until January 28, 1998, reflects claimant's hire as a part-time worker at $5.95 per hour. This form was not signed by claimant because her injury occurred prior to its completion.

The job to which claimant was referred at Sheridan Elementary School, filling in for another employee, was a permanent part-time position. Claimant's classification on January 20, 1998, was on call substitute custodian. Mr. Winder testified that, if claimant proved satisfactory, she could ultimately become a full-time custodian, which would pay approximately $6.50 per hour.

At claimant's counsel's request, she was examined by Monty Longacre, a vocational counselor certified with the State of Kansas. Mr. Longacre met claimant and ultimately

prepared a list of seventeen tasks, of which ten were not duplicates. During Mr. Longacre's first deposition of March 29, 1999, it was discovered that jobs performed by claimant prior to her injury had been excluded from Mr. Longacre's tasks list. These included jobs at Fort Riley as a dishwasher and a job in Hawaii. In addition, it was noted that Mr. Longacre assumed several of claimant's prior jobs were full-time jobs when instead, on some of the jobs, claimant worked only 18 hours per week as a part-time employee. Mr. Longacre also wrongly assumed claimant's custodial position with the school district was a full-time position. Mr. Longacre did not contact any of claimant's previous employers to verify the job tasks discussed between he and claimant.

This confusion led to a second deposition of Mr. Longacre on May 5, 1999. Mr. Longacre prepared an amended report after again meeting with claimant. The amended report contained additional information regarding her work but excluded her employment in Hawaii. Mr. Longacre did not ask claimant about her work in Hawaii and acknowledged that the tasks contained in that job could potentially change his evaluation of claimant and her task analysis.

With regard to claimant's job search, he did not specifically ask claimant what jobs she had been looking for, nor did he inquire about any specific employers that she may have visited or left applications with. Claimant simply told him she was looking for jobs.

Claimant was evaluated by Karen Crist Terrill, a vocational rehabilitation counselor, at the request of respondent's attorney on April 8, 1999. Ms. Terrill's evaluation of claimant's job task list included the Fort Riley dishwasher job and claimant's period of self-employment between 1984 and 1987. The location of the self-employment is not explained, although there is some indication in the record that this may have been a job claimant performed while in Hawaii. Ms. Terrill identified a total of twenty-one separate and distinct job tasks performed in claimant's 15-year work history. Ms. Terrill was advised by claimant of a total of ten to fifteen applications claimant had submitted in her attempts to find employment. Some of these applications occurred as recently as one week before Ms. Terrill's interview with claimant and included companies such as McDonald's, Burger Kings, Arby's and Farley Grocery Store in the Junction City area. Claimant also identified Electro-Wire, a local business in the Junction City area, and certain contacts made at Fort Riley. When Ms. Terrill contacted the various employers listed by claimant, she testified that she was unable to verify that any applications had been submitted to any of these companies. However, the Fort Riley contact was not verified due to Freedom of Information limitations. The remainder of the employers contacted, including Electro-Wire, Arby's, two Burger Kings and three McDonald's, reported they had no applications on file from claimant.

Mr. Longacre's report was provided to Dr. Delgado at the time of his deposition. Dr. Delgado reviewed the report the morning of the deposition, but did not have the opportunity to discuss the job tasks list with the claimant. His understanding of claimant's

job tasks was based upon Mr. Longacre's report only. On a time weighted basis, claimant had a 98 percent task loss. Without considering the time weighted computations, claimant had a 76.77 percent loss of task performing ability.

The report of Ms. Terrill was provided to Dr. Hu for his review. In comparing the task report of Ms. Terrill to the restrictions placed upon claimant by Dr. Hu, he felt claimant would be able to perform all the job tasks listed in the report.

Neither expert was instructed to offer claimant any form of job search assistance.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is claimant's burden to establish his or her right to an award of compensation by proving the various conditions upon which his or her right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

Claimant's testimony regarding the slip and fall which occurred in the parking lot is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

While respondent's representative, Mr. Winder, does indicate claimant advised him only of an ankle injury, he did agree that claimant advised him immediately of the fall in the parking lot. The claimant's testimony that she injured both her ankle and her back is consistent with the medical evidence and, therefore, found to be credible testimony. The Appeals Board finds, therefore, that claimant has proven accidental injury arising out of and in the course of her employment with respondent, with the injuries including not only her ankle but also her back.

Claimant contends that she was a full-time employee, hired at $6.95 per hour. The testimony of Mr. Winder contradicts claimant's contentions. Claimant identifies an employee by the name of Dr. Brooks, whom she supposedly discussed her salary with. Claimant does not identify who Dr. Brooks is or where he is located other than her comment that he was at the school. Mr. Winder did not identify any individual working for the school district by the name of Dr. Brooks. He did, however, identify the personnel director, Dr. Kimball. Claimant never testified regarding any conversations with Dr. Kimball.

Mr. Winder was the custodial manager and oversaw all the custodians in the school district. He was familiar with claimant, talked to her on several occasions and advised her on more than one occasion that he was not interested in hiring her as a full-time employee. The only work available was as an on call custodian, which was a part-time position paying $5.95 per hour. Mr. Winder also testified that, even if claimant became a full-time

custodian, the highest hourly rate she would be expected to earn is $6.50 per hour. The Appeals Board finds claimant's testimony regarding the supposed salary and the full-time status of her job to not be supported by a preponderance of the credible evidence. Mr. Winder's testimony is more compelling in this regard. The Appeals Board, therefore, finds that claimant was hired as a part-time employee, working 20 hours a week at $5.95 per hour. Therefore, claimant's average weekly wage would be $119 per week.

Respondent requests that certain costs and fees associated with the second deposition of Monty Longacre be assessed to the claimant. The Appeals Board finds, while there appears to be some dispute as to the necessity of the second deposition, that the costs associated with that deposition should be assessed against the respondent. In this regard, the Award of the Administrative Law Judge is reversed.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by the medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The parties have stipulated that claimant has a 5 percent whole body disability on a functional basis. With regard to the nature and extent of claimant's injury and/or disability, K.S.A. 1997 Supp. 44-510e defines the extent of permanent partial disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

The Appeals Board must first consider respondent's contention that claimant has violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proper job that the worker has the ability to perform. In this instance, claimant was offered employment with respondent and attempted to perform that job for approximately one hour. Claimant contends that she was unable to fulfill the responsibilities of the job due to pain. Mr. Winder testified that claimant returned to work in September after being released by the doctor in June. Claimant's attempt at employment may have been cut short because she injured herself as she walked into the

custodial office. But, ever since that time, claimant has neither returned to Mr. Winder's office nor telephoned him requesting a return to work.

In addition, claimant violated the policy set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), in that claimant failed to make a good faith effort to obtain post-injury employment. In Copeland, the Court of Appeals held that, if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. In this instance, claimant discussed several attempts at employment, post injury, at various employers in the Junction City area. However, Ms. Terrill, when attempting to verify claimant's attempts, was unable to find a single employer who would support claimant's testimony. Various employers specifically mentioned by claimant had no history of claimant filing any application for work, and some of those contacts occurred only shortly before Ms. Terrill's contact.

The Appeals Board finds claimant did not initially violate the policy set forth in Foulk, when she did attempt to return to work with respondent, but was unable to perform the physical duties required. However, claimant's attempts at employment after her one-hour stint with respondent do not constitute a good faith effort at obtaining employment, post injury. While claimant discussed several attempts at obtaining employment, none of these supposed attempts could be verified. Claimant testified to submitting applications at several locations, but none of these employers were able to confirm these allegedly submitted applications for employment. The Appeals Board finds claimant has violated the policy set forth in Copeland, *supra*, and a post-injury wage, based upon the evidence in the record as to claimant's wage earning ability, will be imputed.

Both Mr. Longacre and Ms. Terrill testified that claimant could earn a minimum of $5.15 per hour with no limitation as to the number of hours per week claimant could work. Also, Ms. Terrill stated that, assuming the restrictions of Dr. Hu applied, she would not place any restrictions on claimant's ability to earn post-injury wages from this injury. The Appeals Board finds claimant capable of earning a wage at least 90 percent of that that she was earning with respondent on the date of accident. Claimant is, therefore, limited under K.S.A. 1997 Supp. 44-510e to her functional impairment of 5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 12, 1999, should be, and

is hereby, modified, and an award is granted in favor of the claimant, Diane Cooper, and against the respondent, U.S.D. 475, and its insurance carrier, Kansas Association of School Boards, for an injury occurring on January 20, 1998, and based upon an average weekly wage of $119 per week.

Claimant is entitled to 17.71 weeks of temporary total disability compensation at the rate of $79.34 per week totaling $1,405.11, followed by 20.61 weeks permanent partial disability compensation at the rate of $79.34 per week totaling $1,635.20, for a 5 percent permanent partial functional disability, for a total award of $3,040.31.

As of this award, the entire amount is due and owing and ordered paid in one lump sum minus amounts previously paid.

Claimant's attorney fee contract is approved insofar as it does not exceed the limits contained in K.S.A. 1997 Supp. 44-536.

Unauthorized medical is awarded up to $500 upon presentation of an itemized statement verifying same.

Future medical treatment will be considered upon proper application to and approval by the Director.

The fees associated with the litigation of the Workers Compensation Act shall be assessed against the respondent and its insurance carrier to be paid as follows:

Nora Lyon & Associates	$401.80
Appino & Biggs Reporting Service	$377.00
Owens, Brake, Cowan & Associates	$649.75
Bannon & Associates	$312.20
Metropolitan Court Reporters	$366.55
Owens, Brake, Cowan & Associates	$220.40

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority opinion. I believe the greater weight of the evidence proves that claimant made a good faith effort to find work and, therefore, her permanent partial general disability should be based upon a work disability.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Anton C. Andersen, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director